

feasible point on rates, terms, and conditions that are just, reasonable, and nondiscriminatory in accordance with the terms and conditions of the agreement and the requirements of [section 251] . . . and section 252." Section 251(c)(3) further provides that an incumbent LEC "shall provide such unbundled elements in a manner that allows requesting carriers to combine such elements in order to provide such telecommunications service." Based on our review of the record on this issue, we conclude that BellSouth does not meet this checklist item because BellSouth has not demonstrated that it can make available as a legal and practical matter access to unbundled network elements in a manner that allows competing carriers to combine them. In particular, BellSouth has failed to demonstrate that it can provide access to such elements through the one method that it has identified for such access -- collocation. We emphasize that our review of collocation as the means of access to unbundled network elements for the purpose of combining is predicated on BellSouth's position that this is the primary method that it will make available to new entrants.

2. Background

183. In the *Local Competition Order*, the Commission ruled that new entrants may provide telecommunications service wholly through the use of unbundled network elements purchased from incumbent LECs. The Eighth Circuit agreed. In its July 18, 1997 opinion, the Court wrote: "we believe that the plain language of subsection 251(c)(3) indicates that a requesting carrier may achieve the capability to provide telecommunications services completely through access to the unbundled elements of an incumbent LEC's network."⁵³⁶ The court also ruled, however, that the Act does not require incumbent LECs to combine the network elements that new entrants purchase, and vacated the Commission's rules requiring incumbent LECs to combine elements.⁵³⁷ In a subsequent ruling on rehearing, decided on October 14, 1997, the court vacated the Commission's rule that had barred incumbent LECs from separating network elements that were already combined in their network.⁵³⁸ The Court reiterated that incumbent LECs must offer unbundled network elements in a manner that allows new entrants to combine them to provide a finished telecommunications service.⁵³⁹

184. In the *Local Competition Order*, the Commission identified the methods by which new entrants may obtain access to unbundled network elements.⁵⁴⁰ It concluded that

⁵³⁶ *Iowa Utils. Bd.*, 120 F.3d at 814.

⁵³⁷ *Id.* at 813.

⁵³⁸ That rule, 47 C.F.R. § 51.315(b), provided that: "[e]xcept upon request, an incumbent LEC shall not separate requested network elements that the incumbent LEC currently combines." The Court ruled that section "251(c)(3) does not permit a new entrant to purchase the incumbent LEC's assembled platform(s) of combined network elements (or any lesser existing combination of two or more elements) in order to offer competitive telecommunications services." *Iowa Utils. Bd. v. FCC, Rehearing Order*.

⁵³⁹ *Iowa Utils. Bd. v. FCC, Rehearing Order*.

⁵⁴⁰ *Local Competition Order*, 11 FCC Rcd at 15776-807.

"any requesting carrier may choose any particular method of technically feasible . . . access to unbundled network elements." including physical or virtual collocation. The Commission noted that physical and virtual collocation were the only methods of access to unbundled network elements "specifically addressed in section 251."⁵⁴¹ This finding was reflected in our rules which provide that technically feasible methods of obtaining interconnection or access to unbundled network elements include, but are not limited to, physical and virtual collocation at the premises of an incumbent LEC.⁵⁴² The Commission has previously defined physical collocation as an offering that enables a requesting carrier to locate its own transmission equipment in a segregated portion of the LEC's central office. The requesting carrier must typically pay for the construction of a collocation cage to house the equipment in the LEC's central office. The other carrier pays the LEC for the use of that central office space, and may enter the central office to install, maintain, and repair the equipment.⁵⁴³ The Commission has previously defined virtual collocation as an offering in which the LEC owns or leases, and exercises exclusive physical control over, the transmission equipment located in the central office that terminates the requesting carrier's circuits. The LEC dedicates this equipment to the exclusive use of the requesting carrier, and provides installation, maintenance, and repair services.⁵⁴⁴

185. When BellSouth filed its application on September 30, 1997, the United States Court of Appeals for the Eighth Circuit had not yet issued its ruling on rehearing that invalidated the Commission's rule that incumbent LECs could not separate already combined elements and require new entrants to recombine them. Nonetheless, BellSouth's SGAT provides that new entrants must combine all network elements, even those already combined in the incumbent LEC's network.⁵⁴⁵ The SGAT's provisions relating to the terms and

⁵⁴¹ The requirements governing an incumbent LEC's duty to provide collocation space to new entrants are contained in section 251(c)(6) of the Act. It imposes on all incumbent LECs the duty to provide for "physical collocation of equipment necessary for interconnection or *access to unbundled network elements* at the premises of the local exchange carrier, except that the carrier may provide for virtual collocation if the [LEC] demonstrates to the State commission that physical collocation is not practical for technical reasons or because of space limitations." 47 U.S.C. § 251(c)(6) (emphasis added).

⁵⁴² 47 C.F.R. § 51.321(b).

⁵⁴³ *Local Exchange Carriers' Rates, Terms, and Conditions for Expanded Interconnection through Physical Collocation for Special Access and Switched Transport*, Second Report and Order, CC Docket No. 93-162 (rel. June 13, 1997) at para. 7.

⁵⁴⁴ *Expanded Interconnection with Local Telephone Company Facilities*, Memorandum Opinion and Order, 9 FCC Rcd 5154, 5158 (1994) (*Expanded Interconnection Memorandum Opinion and Order*).

⁵⁴⁵ This provision of the SGAT was the subject of a motion to dismiss filed by AT&T and LCI. AT&T and LCI argued that this provision violated the Commission's subsequently vacated rule barring incumbent LECs from separating combined elements. *AT&T/LCI Motion to Dismiss* at 8-14. As noted *supra* note 2, we treated this motion as early filed comments. In addition, MCI argues that BellSouth does not offer nondiscriminatory access to unbundled network elements, because, on the date BellSouth filed its application, the Commission's rules required incumbent LECs to provide access to combinations of network elements that already exist in the

conditions by which BellSouth will provide unbundled network elements to new entrants in a manner that allows new entrants to combine them is found in section II(F) of the SGAT. It provides in full:

F. CLEC-Combined Network Elements

1. CLEC Combination of Network Elements. CLECs may combine BellSouth network elements in any manner to provide telecommunications services. BellSouth will physically deliver unbundled network elements where reasonably possible, e.g., unbundled loops to CLEC collocation spaces, as part of the network element offering at no additional charge. Additional services desired by CLECs to assist in their combining or operating BellSouth unbundled elements are available as negotiated.
2. Software Modifications. Software modifications, e.g., switch translations, necessary for the proper functioning of CLEC-combined BellSouth unbundled network elements are provided as part of the network element offering at no additional charge. Additional software modifications requested by CLECs for new features or services may be obtained through the bona fide request process.⁵⁴⁶

The terms and conditions contained in the SGAT concerning collocation are found in section II(B)(6). The SGAT's collocation offering states in full:

Collocation. Collocation allows CLECs to place equipment in BellSouth facilities. Physical and virtual collocation are available for interconnection and access to unbundled network elements as described in Section II. BellSouth will provide physical collocation for CLEC equipment unless BellSouth demonstrates to the [state] Commission that physical collocation is not practical for technical reasons or space limitations. Detailed guidelines for collocation are contained in BellSouth's Handbook for Collocation.⁵⁴⁷

Attachment A to the SGAT also provides interim rates for physical and virtual collocation. For one rate category, the space preparation fee for physical collocation, the schedule does not

incumbent's network. MCI Comments at 58. Although we expect BOCs to submit applications that comply with our existing rules at the time the application is submitted, we do not rely on this deficiency as a basis for our decision, because, as discussed below, BellSouth has not demonstrated that it is offering nondiscriminatory access to unbundled network elements in any event.

⁵⁴⁶ SGAT § II(F).

⁵⁴⁷ SGAT § II(B)(6).

include any rates but rather provides that this fee will be subject to negotiation on an individual case basis.⁵⁴⁸

3. Evidence in the Record

186. To satisfy its obligation to provide unbundled network elements to new entrants in a manner that allows them to be combined, BellSouth offers only the terms and conditions of section II.F. of the SGAT, *i.e.*, that BellSouth will physically deliver certain elements, including the loop, to "CLEC collocation spaces" at no additional charge and undertake necessary software changes at no additional charge. Any other arrangement would be subject to negotiation. The record supplied by BellSouth with its initial application provides no further information.⁵⁴⁹

187. The South Carolina Commission found that BellSouth had met checklist item (ii), concluding that the SGAT "provides CLECs with nondiscriminatory access to network elements in accordance with the requirements of the Act."⁵⁵⁰ The Department of Justice contends, however, that the South Carolina Commission did not address the specific issue of whether BellSouth is offering unbundled network elements in a manner that allows them to be combined. According to the Department of Justice, at the time the *South Carolina Commission Compliance Order* was issued, the SGAT did not permit competitors to combine network elements to provide finished services. Thus, there was no basis for presenting evidence in the state proceeding concerning the manner in which BellSouth would provide separated network elements so that new entrants could combine them, or whether BellSouth had the practical ability to do so. After the Eighth Circuit held in its July 18, 1997, decision that unbundled network elements must be provided in a manner that allows requesting carriers to combine such elements, the South Carolina Commission, without additional hearings, approved a revised SGAT (which forms the basis of this application) in an order that contains no discussion or specific findings that the SGAT's provisions would allow requesting carriers to combine network elements in a reasonable and nondiscriminatory manner.⁵⁵¹ BellSouth counters that the South Carolina Commission granted parties an additional opportunity to comment after the Eighth Circuit's July 18, 1997 ruling, and approved the revised SGAT after considering the information provided by opposing parties in their written submissions.⁵⁵²

188. In their comments, several parties and the Department of Justice maintain that BellSouth's SGAT fails to state adequately the terms and conditions by which BellSouth will make available unbundled network elements in a manner that allows new entrants to combine

⁵⁴⁸ *Id.* Attach. A at 1.

⁵⁴⁹ BellSouth Milner Aff. at para. 27-30; BellSouth Varner Aff. at paras. 67-80.

⁵⁵⁰ BellSouth Reply Comments at 31 (quoting *South Carolina Commission Compliance Order* at 40).

⁵⁵¹ Department of Justice Evaluation at 17-19. *See also infra* para. 31.

⁵⁵² BellSouth Varner Reply Aff. at paras. 28-30.

them, and has failed to demonstrate that it was operationally capable of providing elements in this manner. They thus argue that the Commission should find that BellSouth fails checklist item (ii).⁵⁵³ More specifically, the Department of Justice finds that the SGAT is legally insufficient, because it does not adequately "specify *what* BellSouth will provide, the *method* in which it will be provided, or the *terms* on which it will be provided, and therefore there is no basis" for a finding that BellSouth is offering nondiscriminatory access as the checklist requires.⁵⁵⁴ It also notes that the SGAT does not "even specify what combinations of network elements it proposes to separate and require the CLEC to combine, a defect that will make it exceedingly difficult for a CLEC to plan for the use of such elements."⁵⁵⁵ The Department of Justice finds that the SGAT's lack of "critical details" requires that much will be left for future negotiation, which is inconsistent with the Department of Justice's view that the SGAT must offer "specific and legally binding commitments."⁵⁵⁶ The Department of Justice also concludes that BellSouth had not demonstrated that it possesses the technical capability to provide unbundled network elements in a way that allows new entrants to combine them. The Department of Justice concludes by noting the importance of unbundled network elements as an entry strategy and the competitive consequences of BellSouth requiring new entrants to establish collocation facilities and thus incur "substantial cost and delay . . . to use combinations of elements."⁵⁵⁷

189. In its reply, BellSouth provides further information on the manner by which it intends to provide unbundled network elements and identifies certain elements which it will continue to offer in combination and not separate and require new entrants to combine. BellSouth also makes clear that it will not allow new entrants supervised physical access to BellSouth's central office equipment and facilities in order to reconnect network elements directly, arguing that such access would pose serious risks to the network.⁵⁵⁸ Instead, BellSouth argues that the Act "indicates that an incumbent LEC will provide access to its unbundled network elements at a dedicated collocation space located at the premises of the incumbent LEC."⁵⁵⁹ BellSouth argues that section 251(c)(6) is the Act's only statutory authorization for entry by new entrants onto the premises of an incumbent LEC for purposes of combining elements, and that, lacking any other statutory authority, the Commission may not require further access by new entrants to the central office or other facilities of incumbent

⁵⁵³ Department of Justice Evaluation at 16-25; AT&T Comments at 22-23; AT&T Reply Comments at 5-10; CompTel Comments at 14-16; LCI Comments at 11-14; MCI Comments at 59-61.

⁵⁵⁴ Department of Justice Evaluation at 20 (emphasis in original).

⁵⁵⁵ *Id.* at 21.

⁵⁵⁶ *Id.* at 21-22.

⁵⁵⁷ *Id.* at 25.

⁵⁵⁸ BellSouth Reply Comments at 33.

⁵⁵⁹ *Id.* (citing section 251(c)(6)).

LEC.⁵⁶⁰ BellSouth further notes that, under the Act, if an incumbent LEC shows that physical collocation is not practical for technical reasons or space limitations, the incumbent LEC may instead offer virtual collocation.⁵⁶¹

190. BellSouth states that it will provide new entrants access to unbundled network elements primarily through physical collocation. BellSouth more specifically describes the manner in which it will make unbundled network elements available to collocation space:

CLECs can obtain access to and combine unbundled network elements, for example unbundled local switching and unbundled loops, through the use of a collocation arrangement. Such combining of unbundled network elements by the CLEC may also include equipment or facilities which the CLEC provides for itself. BellSouth will extend unbundled network elements to a CLEC's physical collocation arrangement and will terminate those unbundled network elements in such a way as to allow the CLEC to provide any cross connections or other required wiring within the collocation arrangement in order to effect the combination. As mentioned above, a CLEC might combine individual unbundled network elements such as an unbundled loop with an unbundled switch port. Both the loop and the switch port are normally terminated on the Main Distributing Frame (MDF) within the BellSouth central office. Upon request of the CLEC, BellSouth will wire the loop from the MDF to the CLEC's collocation arrangement. The CLEC may then combine any unbundled loop it has acquired from BellSouth with any unbundled switch port it has acquired from BellSouth, subject to the technical parameters of the loop and the port. By technical parameters I refer to the characteristics and functionality provided by given unbundled network elements. For example, a two-wire analog unbundled loop will normally be combined with a two-wire unbundled switch port. The CLEC is responsible for making any necessary cross connections within the physical collocation arrangement. Other UNEs which the CLEC acquires from BellSouth may be combined by the CLEC in like manner.⁵⁶²

191. In its reply, BellSouth also for the first time identifies those elements that it will offer in combination, *i.e.*, that it will not separate and require incumbent LECs to recombine. As BellSouth notes, some of these elements technically cannot be separated. According to an affidavit filed by BellSouth, it will provide the following element combinations and will coordinate orders for them: loop and cross connect, port and cross connect, port and cross connect and common transport, loop distribution and network interface device (NID), port and vertical features, loops with loop concentration, port and common

⁵⁶⁰ BellSouth Reply Comments at 34.

⁵⁶¹ *Id.* at 33.

⁵⁶² BellSouth Milner Reply Aff. at para. 13.

transport, loops and local number portability (LNP).⁵⁶³ BellSouth also represents that: "[i]n states where the loop and NID are priced separately, a loop and NID combination and loop, NID, cross connect combination will be offered. The price for each of these combinations is the sum of the individual element prices."⁵⁶⁴

192. BellSouth denies the Department of Justice's argument that the SGAT insufficiently describes the terms and conditions by which BellSouth will provide unbundled network elements for combination. It contends that "[t]here are no different methods or terms for the provision of UNEs when a new entrant uses the UNEs individually or combines them with other UNEs or its own facilities."⁵⁶⁵ Thus, according to BellSouth, the SGAT does describe the terms and conditions of its unbundled network element offering. BellSouth further states that "[i]f a UNE can be physically separated, BellSouth will deliver it on a separated basis. If a UNE cannot be physically separated, access will be provided in the same manner as for use on an uncombined basis."⁵⁶⁶

193. Because BellSouth relies on collocation as the primary means by which new entrants can combine unbundled network elements, and collocation is the only means explicitly identified in the SGAT, we also review the SGAT's provisions relating to collocation.⁵⁶⁷ The SGAT's collocation terms and conditions were quoted above and essentially repeat the statutory language found in section 251(c)(6). In addition, the SGAT refers to "[d]etailed guidelines for collocation [that] are contained in BellSouth's Handbook for Collocation."⁵⁶⁸ The Handbook for Collocation (Collocation Handbook) to which the SGAT refers contains general information regarding the terms and conditions, ordering, provisioning and maintenance of BellSouth's physical collocation offering.⁵⁶⁹ The Collocation

⁵⁶³ BellSouth Varner Reply Aff. at para. 21.

⁵⁶⁴ *Id.*

⁵⁶⁵ *Id.* at para. 32.

⁵⁶⁶ *Id.* at para. 21.

⁵⁶⁷ As noted, the section of the SGAT addressing combinations of unbundled network elements offers to deliver unbundled network elements physically to new entrants' collocation spaces. Other arrangements apparently could be negotiated. The SGAT provides that "[a]dditional services desired by CLECs to assist in their combining or operating BellSouth unbundled elements are available as negotiated." *Id.* § II(F).

⁵⁶⁸ *Id.* § II(B)(6).

⁵⁶⁹ As noted by BellSouth, the Collocation Handbook:

[b]y design . . . does not contain detailed descriptions of network interface qualities, network capabilities, local interconnection or product service offerings. This document does not represent a binding agreement in whole or in part between BellSouth and subscribers of BellSouth's Collocation services. For actual Terms and Conditions for BellSouth's Physical Collocation offering, please refer to BellSouth's Master Collocation Agreement.

Handbook in turn refers to a Master Collocation Agreement (Master Agreement) for the "actual Terms and Conditions for BellSouth's Physical Collocation offering."⁵⁷⁰ This Master Agreement is a model for a new entrant to use to negotiate a region-wide collocation agreement with BellSouth, a necessary step before BellSouth will implement a collocation request. Neither the Collocation Handbook (although referenced in the SGAT), nor the Master Agreement, is included among the attachments to the SGAT. In addition, the Master Agreement was not submitted to the South Carolina Commission for review.⁵⁷¹

194. BellSouth states that its ability to provide collocation to competing carriers is evidenced by the fact that, as of the date of the application, there were 14 physical collocation arrangements in place in BellSouth's region, and 86 in progress, including one in South Carolina.⁵⁷² BellSouth also claims that, as of August 31, 1997, there were 145 virtual collocation arrangements across BellSouth's region, including five in South Carolina, and 43 in progress, of which one was in South Carolina.⁵⁷³ The South Carolina Commission concluded that BellSouth has demonstrated its ability to provide collocation.⁵⁷⁴ The South Carolina Commission also found that BellSouth's witnesses testified in the state proceeding that BellSouth has technical service descriptions and procedures in place for the ordering, provisioning, and maintenance of its collocation services.⁵⁷⁵ We note that BellSouth has made no claim, and there is no evidence in the record, that any of the current physical collocation arrangements, or those in progress, are for the purpose of permitting new entrants to combine unbundled network elements as contemplated in section II(F)(1) of the SGAT.

4. Discussion

195. The use of unbundled network elements, as well as the use of combinations of unbundled network elements, is an important entry strategy into the local telecommunications market. In the 1996 Act, Congress sought to hasten the development of competition in local telecommunications markets by including provisions to ensure that new entrants would be able to choose among three entry strategies -- construction of new facilities, the use of unbundled

BellSouth Varner Aff., Ex. AJV-4 (Collocation Handbook) at 3; *Ex Parte* Letter from William (Whit) Jordan, Vice President - Federal Regulatory, BellSouth, to William F. Caton, Acting Secretary, Federal Communications Commission (Nov. 6, 1997), at 1 (BellSouth Nov. 6, 1997 *Ex Parte*).

⁵⁷⁰ BellSouth Varner Aff., Ex. AJV-4 at 3.

⁵⁷¹ BellSouth also did not include the Master Agreement with its original filing in this proceeding but filed it later in an *ex parte* at the request of staff. BellSouth Nov. 6, 1997 *Ex Parte* at 1.

⁵⁷² BellSouth Application at 34-35, BellSouth Milner Aff. at para. 20 & Ex. WKM-2.

⁵⁷³ BellSouth Application at 34-35, BellSouth Milner Aff. at paras. 25-26 & Ex. WKM-2.

⁵⁷⁴ *South Carolina Commission Compliance Order* at 31-32.

⁵⁷⁵ *Id.* at 31-32.

elements of an incumbent's network, and resale.⁵⁷⁶ Congress included the second entry strategy because it recognized that many new entrants will not have constructed local networks when they enter the market.⁵⁷⁷ As a result, the ability of new entrants to use unbundled network elements, as well as combinations of unbundled network elements, is integral to achieving Congress' objective of promoting competition in the local telecommunications market. In particular, a new entrant using unbundled network elements has the incentive and ability to package and market services in ways that differ from the BOCs' existing service offerings in order to compete in the local telecommunications market. In contrast, carriers reselling an incumbent LEC's services are limited to offering the same services that the incumbent offers at retail.⁵⁷⁸ Moreover, competing providers may combine unbundled network elements with facilities they construct to provide a wide array of competitive choices.

196. To achieve its objective of ensuring that new entrants would have access to unbundled network elements, as well as the ability to combine such elements, Congress adopted section 251(c)(3). Congress further required the Commission to verify that a section 271 applicant is meeting its obligation to offer nondiscriminatory access to unbundled network elements prior to granting in-region, interLATA authorization to the applicant. Because the use of unbundled network elements, as well as the use of combinations of unbundled network elements, is an important entry strategy into the local telecommunications market, we emphasize the importance of ensuring that BOC applicants comply with the requirement that they provide nondiscriminatory access to network elements in a manner that allows competing providers to combine such network elements.

197. After reviewing the evidence in the record, we conclude that BellSouth has failed to demonstrate that it provides nondiscriminatory access to network elements in accordance with section 251(c)(3) of the Act, and therefore fails to meet item (ii) of the competitive checklist. Pursuant to section 251(c)(3), BellSouth must offer unbundled network elements to new entrants in a manner that allows new entrants to combine them to provide a telecommunications service. We recognize that we and the industry are still in the early stages of evaluating the implications of the Eighth Circuit's ruling that, although competing carriers may offer services solely through the use of unbundled network elements, the competing carriers must combine those elements themselves. Various methods of combining elements are being discussed by the industry. In this Order, we focus only on the one method of recombining that BellSouth offers in this application -- collocation -- and conclude that

⁵⁷⁶ See *Iowa Utils. Bd.*, 120 F.3d at 816 ("Congress clearly included measures in the Act, such as the interconnection, unbundled access, and resale provisions, in order to expedite the introduction of pervasive competition into the local telecommunications industry.").

⁵⁷⁷ See *id.* ("Congress recognized that the amount of time and capital investment involved in the construction of a complete local stand-beside telecommunications network are substantial barriers to entry, and thus required incumbent LECs to allow competing carriers to use their networks in order to hasten the influence of competitive forces in the local telephone business.").

⁵⁷⁸ See 47 U.S.C. § 251(c)(4).

BellSouth has not demonstrated that new entrants may obtain and recombine network elements pursuant to its collocation offering. We find that the SGAT is deficient because it fails to include definite terms and conditions for recombining network elements. As noted above, the SGAT's provisions relating to the terms and conditions by which BellSouth will provide unbundled network elements to new entrants in a manner that allows new entrants to combine them consists of two brief paragraphs that lack crucial details such as which elements will be separated and which will be provided in combination, and how and at what cost.⁵⁷⁹ Because the SGAT does not adequately specify what BellSouth will provide, the method in which it will be provided, or the terms upon which it will be provided, there is no basis for a finding that BellSouth is offering nondiscriminatory access as the checklist requires.⁵⁸⁰ The SGAT provides nothing more than an offer to negotiate many of the terms of combining network elements. An offering composed of vague terms that merely form the starting point for negotiation over the specific details undercuts the rationale for the SGAT.⁵⁸¹ As stated by the South Carolina Commission, the SGAT "can provide the proper vehicle for CLECs to use to enter the local market quickly without having to negotiate an interconnection agreement with an incumbent LEC. The Statement may be particularly useful to smaller carriers that wish to do business with the incumbent LEC without becoming involved with formal negotiations."⁵⁸² That BellSouth provided additional details on recombining network elements in its reply does not alter our conclusion that the SGAT is too indefinite. These additional details are not binding on BellSouth. BellSouth's reply, therefore, does not correct the problem -- that the SGAT's terms are too vague and therefore legally insufficient.⁵⁸³

198. Even after assessing the additional information concerning BellSouth's offering contained in its reply, we conclude that BellSouth has not demonstrated that it can practically and legally make available unbundled network elements in a manner that allows new entrants to combine them. For the reasons stated below, we conclude that BellSouth has not demonstrated that it offers in its SGAT, or can timely provide in actual practice, collocation as the means for new entrants to combine unbundled network elements consistent with the requirements of the Act.

199. We do not reach in this Order the question of whether or not BellSouth's proposed method of permitting competing providers to rebundle unbundled network elements, assuming the problems with its provision of collocation identified above were resolved, would be consistent with sections 251(c)(3) and 252(d)(2), or whether other methods of recombining must be offered. We note in this regard that the Eighth Circuit has ruled that "a requesting carrier may achieve the capability to provide telecommunications services completely through

⁵⁷⁹ See *supra* para. 185.

⁵⁸⁰ See Department of Justice Evaluation at 20.

⁵⁸¹ See *id.* at 21-22.

⁵⁸² South Carolina Commission Compliance Order at 24.

⁵⁸³ See Department of Justice Evaluation at 20-22.

access to the unbundled elements of an incumbent LEC's network."⁵⁸⁴ The court further concluded that a competing carrier is not required "to own or control some portion of a telecommunications network before being able to purchase unbundled elements."⁵⁸⁵ Finally, the court found that, because the incumbent LECs objected to the Commission's rule that the incumbent LECs must combine network elements, the incumbent LECs "would rather allow entrants access to their networks than have to rebundle the unbundled elements for [the competing carriers]."⁵⁸⁶ As we noted above, we are still evaluating the implications of these rulings and whether they may compel a result that would require methods other than or in addition to collocation for combining network elements.

200. Although collocation is not a separate checklist item, BellSouth has identified collocation as the primary means by which it provides nondiscriminatory access to unbundled network elements in a manner that allows new entrants to combine them as required by the Act.⁵⁸⁷ Our assessment of BellSouth's claim to have satisfied this statutory requirement thus necessarily involves an assessment of whether BellSouth makes available collocation for this purpose as a legal and practical matter -- *e.g.*, whether it offers collocation on concrete terms and conditions.⁵⁸⁸ In this regard, we believe collocation is analogous to access to OSS functions in that it is essential to the provision of unbundled network elements. This is particularly the case where the BOC relies on collocation as the means by which network elements that have been physically separated may be recombined.

201. We do not believe BellSouth or the South Carolina Commission would dispute our conclusion that collocation is an essential prerequisite to checklist compliance for certain checklist items. In demonstrating compliance with checklist item (i), interconnection, for example, BellSouth describes its collocation offering for that purpose and seeks to

⁵⁸⁴ *Iowa Utils Bd.*, 120 F.3d at 815.

⁵⁸⁵ *Id.*

⁵⁸⁶ *Id.* at 814.

⁵⁸⁷ BellSouth indicates on reply that new entrants may combine certain unbundled network elements at another appropriate location where obtaining access at the new entrant's collocation space is not practical. As an example, BellSouth states that new entrants could access the NID on an unbundled basis at the end user's premises, as well as in combination with other subloop elements that BellSouth offers. BellSouth Reply Comments at 33-34. The NID provides a single line termination device or that portion of a multiple line termination device required to terminate a single line or circuit. The NID, located on the customer's premises, establishes the official network demarcation point between a telecommunications company and its end user customer. BellSouth Varner Aff. at para. 91. We understand this offer to mean that new entrants could combine the loop with the NID. See BellSouth Varner Reply Aff. at para. 21.

⁵⁸⁸ See *supra* para. 81 (a BOC has a concrete and specific legal obligation to furnish a checklist item upon request pursuant to its SGAT). As we noted in the *Local Competition Order*, collocation is a method of interconnection and access to unbundled network elements. *Local Competition Order*, 11 FCC Rcd at 15779.

demonstrate that it makes collocation practically available for interconnection purposes.⁵⁸⁹ The South Carolina Commission assesses BellSouth's collocation offering in the context of access to network elements.⁵⁹⁰ It thus appears that both BellSouth and the South Carolina Commission recognize that BellSouth must show that collocation is available in order to demonstrate that it offers interconnection or access to unbundled network elements consistent with competitive checklist items (i) and (ii).

202. Having determined that BellSouth must demonstrate that it can make available collocation in order to show compliance with the competitive checklist, we assess BellSouth's collocation offering for the purpose of allowing new entrants to combine network elements. We conclude that BellSouth has failed to demonstrate that it can provision physical collocation in a timely manner that permits new entrants to combine unbundled network elements to provide telecommunications services. BellSouth's SGAT does not commit BellSouth to any particular interval for entertaining and implementing requests for collocation. Moreover, BellSouth provides no evidence in the record concerning its actual physical collocation installation intervals. At most, it presents testimony concerning its "anticipated" implementation interval of two to four months.⁵⁹¹ BellSouth's failure to include a commitment in its SGAT for installation intervals for physical collocation, coupled with the evidence in the record concerning the length of time it is taking to install physical collocation, creates concern that there may be unreasonable delays in providing collocation space. Because all carriers must apparently now use collocation in order to provide telecommunications service through a combination of BellSouth's unbundled network elements, or at least for combining the loop and the switch, unreasonable delays in provisioning collocation space create a formidable entry barrier. We concur with the Department of Justice that the substantial delays of establishing collocation facilities for new entrants wishing to use combinations of elements would impede competitive entry.⁵⁹²

⁵⁸⁹ BellSouth Application at 34-35.

⁵⁹⁰ *South Carolina Commission Compliance Order* at 29, 31-32; *see also Florida Commission Section 271 Order* at 43 ("Although collocation is not a separate checklist item, it is included as one of the six requirements, along with interconnection, unbundled access, and resale, in section 251(c). The collocation requirement consists of the duty to provide for physical collocation of [new entrant] equipment that is necessary for interconnection or access to UNEs at the RBOC premises, under rates, terms and conditions that are just, reasonable, and nondiscriminatory. . . . a carrier's request must be satisfied, and operating pursuant to section 252(c)(6) and individual carrier agreements, before the checklist items for either interconnection or unbundled network elements are satisfied.")

⁵⁹¹ Although a BellSouth witness testified before the South Carolina Commission that it is "anticipated that installation [of physical collocation] will take two to four months from a firm order to equipment installation," this is a projection rather than a commitment on BellSouth's part. This language is not contained in the Collocation Handbook, much less the SGAT. *See BellSouth Application*, App. C, Vol. 4, Tab 60, Prefiled Apr. 1, 1997 Testimony of Robert C. Scheye, BellSouth, South Carolina Commission Docket No. 97-101-C, July 8, 1997, 9:00 a.m. Hr'g (South Carolina Commission July 8, 1997, 9:00 a.m. Hr'g), Tr. at 185.

⁵⁹² Department of Justice Evaluation at 23-25.

203. Our concern with BellSouth's failure to commit in the SGAT to provisioning collocation within a definite interval is heightened by BellSouth's failure to demonstrate that it is in fact offering collocation in a timely manner. BellSouth does not provide any information to counter reports from other sources indicating that BellSouth is not meeting even its non-binding projected implementation interval of two to four months.⁵⁹³ These reports include findings by the Florida Commission that BellSouth has repeatedly failed to meet the three month timeframe required by its interconnection agreements and by the Florida Commission for implementing collocation arrangements.⁵⁹⁴ Another report comes from DeltaCom, a carrier that is seeking to obtain physical collocation from BellSouth in South Carolina. DeltaCom submits an affidavit in this proceeding outlining its experience in obtaining collocation from BellSouth. It states that it took six months to negotiate a region-wide collocation agreement with BellSouth, the necessary first step to obtain any collocation arrangement from BellSouth.⁵⁹⁵ Pursuant to that agreement, once DeltaCom makes a request for collocation, BellSouth has two months to consider that request. DeltaCom states that BellSouth then takes five to eleven months to implement the request, based on DeltaCom's region-wide BellSouth experience.⁵⁹⁶ Although we do not make any ruling here on what constitutes a reasonable timeframe for implementing collocation, the evidence creates a concern that there may be significant delays as new entrants wait for collocation space to be constructed, and BellSouth has submitted nothing to allay this concern. This potential delay may hinder the "rapid" introduction of competition through the use of unbundled network elements contemplated by Congress and noted by the Eighth Circuit.⁵⁹⁷

204. Several commenters have also raised concerns that, if new entrants must construct physical collocation cages in BellSouth central offices in order to combine elements, then they will incur, unnecessarily, higher costs to obtain unbundled network elements. Although we do not reach here the question of whether a requirement that physical collocation *per se* imposes unreasonable costs, we do find that BellSouth has failed to provide sufficient information on whether its physical collocation costs, as contained in the SGAT, are "just, reasonable, and nondiscriminatory."⁵⁹⁸ We find BellSouth's SGAT deficient because its collocation rates do not include any rates for the space preparation fee. That component of

⁵⁹³ See Testimony of Robert C. Scheye, BellSouth, South Carolina Commission July 8, 1997, 9:00 a.m. Hr'g, Tr. at 185.

⁵⁹⁴ *Florida Commission Section 271 Order* at 45, 48, 58. The Florida Commission also found BellSouth's Florida SGAT deficient for not including physical collocation installation intervals. *Id.* at 48, 59, 194.

⁵⁹⁵ ALTS Moses (DeltaCom) Aff. at para. 19.

⁵⁹⁶ *Id.*

⁵⁹⁷ In its discussion of the Commission's unbundling rules, the Eighth Circuit concluded that "the Act itself calls for the *rapid* introduction of competition into local phone markets by requiring incumbent LECs to make their networks available to their competing carriers." *Iowa Utils. Bd.*, 120 F.3d at 817 (emphasis added).

⁵⁹⁸ 47 U.S.C. § 251(c)(6).

cost is left to further negotiation on an individual case basis.⁵⁹⁹ The absence of any space preparation rates creates uncertainty for new entrants and requires further negotiation, undermining the premise of an SGAT, which is to contain sufficiently specific terms and conditions such that checklist items are generally offered and available to all interested carriers at concrete terms,⁶⁰⁰ rather than left largely to future negotiation.⁶⁰¹ We note the contrast with BellSouth's previous *Expanded Interconnection Physical Collocation* tariff filing.⁶⁰² In that tariff filing, BellSouth identified the charges and the costs for each physical collocation rate element, including rate elements associated with space preparation, so that the Commission could evaluate the charges for each rate element. That tariff filing left no costs

⁵⁹⁹ BellSouth's nonrecurring construction charges are separated into three rate elements: application fee (\$3850), space preparation fee (ICB, *i.e.*, negotiated on an individual case basis), and space construction fee (\$4500 per 100 square feet). SGAT Attach. A at 1. BellSouth provides insufficient information for us to gauge the magnitude of space preparation costs in relation to other costs. Because BellSouth does not provide adequate detail in its application as to the elements in its collocation offering, we must assume that the elements, *e.g.*, the collocation cage, are comparable in order to make any type of estimate. Some interconnection agreements filed in this record contain a space preparation fee ranging from \$1,800 to \$8,500. *See, e.g.*, BellSouth Application, App. B, Vol. 3, Tab 22, Interconnection Agreement Between FiberSouth and BellSouth (BellSouth/FiberSouth Interconnection Agreement), Attach. C-1. BellSouth's former expanded interconnection tariff sets the space preparation fee at approximately \$2000. BellSouth Letter from W.W. (Whit) Jordan, BellSouth Executive Director, Federal Regulatory, BellSouth, to William F. Caton, Acting Secretary, Federal Communications Commission, Ex. 2 (Apr. 26, 1994) (BellSouth Apr. 26, 1994 Physical Collocation Tariff Letter). However, we cannot determine whether the space preparation fees are likely to be comparable to those in the tariff or the interconnection agreements because it is not clear whether some of the costs included as space construction costs under BellSouth's former tariff or its interconnection agreements are instead included in the space preparation fee to be negotiated in the SGAT. BellSouth's space construction costs under the interconnection agreements range from approximately \$8,500 per 100 square feet (*e.g.*, agreement with 360 Communications Company) to approximately \$29,000 per 100 square feet (*e.g.*, agreement with FiberSouth). *See* BellSouth Application, App. B, Vol. 3, Tab 25, Interconnection Agreement Between 360 Communications Company and BellSouth, Attach. C-13 at 17; BellSouth/FiberSouth Interconnection Agreement, Attach. C-1. BellSouth's space construction costs in its former tariff amounted to over \$20,000 per 100 square feet. BellSouth Apr. 26, 1994, Physical Collocation Tariff Letter, Ex. 2. In contrast, BellSouth's SGAT specifies space construction costs of only \$4,500 per 100 square feet. SGAT Attach. A at 1. Thus, either BellSouth is charging dramatically less for collocation under the SGAT, or it expects to recover some of the space construction costs through the negotiated space preparation fee. BellSouth does not provide us with sufficient information to ascertain this.

⁶⁰⁰ *See* Department of Justice Evaluation at 13.

⁶⁰¹ *See id.* at 21.

⁶⁰² BellSouth withdrew this filing after the United States Court of Appeals for the District of Columbia Circuit held that the Commission could not require carriers to implement physical collocation, *see Bell Atlantic Telephone Companies v. FCC*, 24 F.3d 1441 (D.C. Cir. 1994), and the Commission ordered LECs to implement virtual collocation instead. *Expanded Interconnection Memorandum Opinion and Order*, 9 FCC Rcd at 5161, 5167-68.

open to future negotiation.⁶⁰³ Accordingly, it is possible for BellSouth to offer generally available terms and conditions, that require no further negotiation, for facilities that appear comparable to those BellSouth would require for combining unbundled network elements.

205. Quite apart from concerns relating to the timeliness of implementing physical collocation arrangements, we find that BellSouth has failed to demonstrate that it can timely deliver unbundled network elements to such spaces, once completed, for combining, or that the provision of those combined elements will be at an acceptable level of quality. As discussed above, a BOC is generally offering a checklist item in its SGAT if that item is both legally and practically available.⁶⁰⁴ We held in the *Ameritech Michigan Order* that, in determining availability of a checklist item, evidence of actual commercial usage of that item is most probative, but a BOC may also submit evidence such as carrier-to-carrier testing, independent third party testing, and internal testing to demonstrate its ability to provide a checklist item.⁶⁰⁵ BellSouth has made no showing that there is actual commercial usage of physical collocation anywhere in its region for the purpose of recombining unbundled network elements. Although BellSouth claims experience in providing physical collocation, it makes no showing that any of the existing collocation arrangements are or can be used to combine unbundled network elements as contemplated in section II(F)(1) of the SGAT.⁶⁰⁶ BellSouth has also made no showing that it has performed any testing of physical collocation for the purpose of recombining network elements. Nor does the record indicate that BellSouth has tested its ability to accept orders for various elements and coordinate those orders in a way that would provide unbundled network elements for combination by new entrants in collocation space. Although BellSouth argues that there should be no difference between running an unbundled loop to a collocation space to be attached to a new entrant's equipment for transmission to a new entrant's switch and running a loop and a switch port to the same space for combining,⁶⁰⁷ BellSouth has provided no evidence to substantiate this allegation.

⁶⁰³ See BellSouth Apr. 26, 1994, Physical Collocation Tariff Letter, Ex. 2. BellSouth, along with other incumbent LECs (e.g., Ameritech, SNET, Nevada Bell), specified region-wide averaged construction costs in its *Expanded Interconnection* tariffs. *Id.* Alternatively, because total prices for different competing carriers may vary due to different preferences for installation, maintenance, and repair, the Commission concluded in the *Expanded Interconnection* proceeding that BOCs should, at a minimum, provide per unit labor and material rates at a particular central office rather than average construction costs. Similarly, we conclude that BellSouth can do the same in its SGAT. See *Expanded Interconnection with Local Telephone Company Facilities*, Report and Order and Notice of Proposed Rulemaking, 7 FCC Rcd 7369, 7442 (1992).

⁶⁰⁴ See *supra* para. 81.

⁶⁰⁵ *Ameritech Michigan Order* at para. 110.

⁶⁰⁶ On an even more fundamental level, BellSouth has not even proven to us that it has significant experience in successfully providing physical collocation. As of August 31, 1997, BellSouth had completed no physical collocations in South Carolina and only fourteen throughout its nine-state region. BellSouth does not represent that these collocations were completed within whatever timeframe was committed to by BellSouth. See MCI Comments at 62.

⁶⁰⁷ See BellSouth Milner Reply Aff. at para. 13.

206. We thus conclude, based on our review of the record on this issue, that BellSouth has failed to demonstrate that it can make available, as a legal and practical matter, access to unbundled network elements in a manner that allows competing carriers to combine them through the one method that it has identified for such access -- collocation. As discussed above, BellSouth has not demonstrated that it can provision physical collocation in a timely manner, or that a new entrant can utilize unbundled network elements delivered to its collocation space at an acceptable level of quality. Moreover, the SGAT's collocation offering fails to state with sufficient specificity the terms and conditions under which new entrants can obtain collocation. Therefore, we find BellSouth does not meet its requirement to provide nondiscriminatory access to unbundled network elements pursuant to the competitive checklist.

207. We are also concerned that BellSouth's application is ambiguous as to whether it makes available virtual collocation for the purpose of combining network elements, but we do not base our decision on this ground. Although the SGAT provides that "[p]hysical and virtual collocation are available for . . . access to unbundled network elements as described in Section II,"⁶⁰⁸ it is unclear from the record whether BellSouth will offer carriers a choice of either physical or virtual collocation in the first instance, or whether virtual collocation would be available, if at all, only if there is no more space for physical collocation.⁶⁰⁹ We are thus concerned that the SGAT could be read to not offer virtual collocation as a choice in the first instance, which would be inconsistent with the Commission's rules as set forth in the *Local Competition Order*.⁶¹⁰ The Commission concluded in the *Local Competition Order* that new entrants have a choice of method for access to unbundled network elements, and that this choice must include (though is not limited to) either physical or virtual collocation.⁶¹¹ Therefore, new entrants must be able to choose virtual collocation as a method of combining network elements, regardless of whether physical collocation is practically available. We note, moreover, that new entrants should have the option of virtual collocation because it may be a less costly, time-consuming, and burdensome method of access to unbundled network elements.

208. Even assuming that BellSouth offers virtual collocation as an option for combining network elements, we are still concerned that BellSouth has not provided any details by which we could determine that its virtual collocation offering actually permits nondiscriminatory access to unbundled network elements in a manner that allows new entrants

⁶⁰⁸ SGAT § II(B)(6). Section II(F) of the SGAT sets forth BellSouth's offering for "CLEC-Combined Network Elements." See *supra* para. 185.

⁶⁰⁹ Although the SGAT states that, "[p]hysical and virtual collocation are available," it subsequently states that, "BellSouth will provide physical collocation for CLEC equipment unless BellSouth demonstrates to the Commission that physical collocation is not practical for technical reasons or space limitations." SGAT § II(B)(6).

⁶¹⁰ See *supra* para. 184.

⁶¹¹ *Local Competition Order*, 11 FCC Rcd at 15779-81; see also 47 C.F.R. § 51.321(b).

to combine them. BellSouth provides no information about how virtual collocation would be provided for this purpose. Evidence from the Florida Commission's section 271 proceeding indicates that BellSouth at least had considered the possibility of using virtual collocation for this purpose. The Florida Commission, however, also noted that BellSouth had failed to provide sufficient information regarding its virtual collocation offering in that state. The Florida Commission stated:

[b]y definition, virtual collocation requires that only BellSouth personnel have access to the [new entrant's] collocation space. Thus, only BellSouth can actually perform the functions at the collocation that are necessary to establish and provide service to [a new entrant's] customers. . . . BellSouth has indicated that it will only negotiate with [new entrants] pursuant to its Bona Fide Request (BFR) process in an attempt to establish so-called "glue" charges, which are charges for combining UNEs at virtual collocations. BellSouth witness Scheye stated that BellSouth will not commit to providing the combining activity.⁶¹²

We are thus concerned that BellSouth has also failed to provide sufficient information on whether it will provide virtual collocation in a manner that permits new entrants to combine unbundled network elements.

209. Finally, we wish to emphasize that BellSouth provided no information on the record on the details concerning this immensely important issue regarding the recombination of unbundled network elements until the reply stage of comments. Although we do not find BellSouth's showing with respect to this issue to be deficient because of the failure to include necessary information with its initial application, we believe it is important to reemphasize the Commission's repeated admonition that section 271 applications must be complete when submitted. Submitting information on reply affords the Department of Justice no opportunity to assess the offering before it submits its evaluation⁶¹³ -- an evaluation to which the Act requires us to give substantial weight. In addition, other interested parties and this Commission have little time to assess the information provided.⁶¹⁴ This is not a situation where an applicant is simply providing information on reply to respond to comments. BellSouth must make a *prima facie* showing in its application that it meets each checklist

⁶¹² *Florida Commission Section 271 Order* at 58. CompTel similarly charges that "BellSouth forces CLECs either to accept those network elements that can be delivered to a collocation cage (and incur the substantial costs of establishing collocation arrangements) or rely on BellSouth's undefined pledge to negotiate a 'glue charge' for BellSouth to recombine the elements." CompTel Comments at 14.

⁶¹³ Under our procedural rules, the Department of Justice must submit its evaluation before a BOC's reply comments are due. See *Sept. 19th Public Notice* at 6-7.

⁶¹⁴ We note that a number of parties, lacking the benefit of the further information submitted by BellSouth upon reply, argued that BellSouth's application was deficient because BellSouth did not explain adequately which combinations of network elements it would provide. See, e.g., AT&T Reply Comments at 6; CompTel Reply Comments at 17-19.

item.⁶¹⁵ As the Department of Justice found, BellSouth's application did not meet this requirement.⁶¹⁶ It cannot correct its initial failure to provide sufficient proof to make out a *prima facie* case by providing that information on reply and claiming it should be considered responsive to criticism that it failed to provide the information in the first place.

5. Other Concerns

210. We are troubled by allegations that BellSouth is not charging cost-based rates for unbundled network elements that, when combined, can be used to offer a service equivalent to a BellSouth retail service.⁶¹⁷ LCI's comments contain a letter from BellSouth dated October 7, 1997, that states: "In all states, when LCI orders individual network elements that, when combined by LCI, duplicate a retail service provided by BellSouth, BellSouth will treat, for purposes of billing and provisioning, that order as one for resale."⁶¹⁸ On the other hand, in its application, BellSouth states that it "permits CLECs to recombine [unbundled network elements] on an end-to-end (or any other basis) thereby creating the equivalent of one of BellSouth's retail services or a different service of their own."⁶¹⁹

211. Although we do not base our decision on this issue, we are concerned about this letter from BellSouth that was sent to a competing carrier a week after BellSouth filed its application. We emphasize that BellSouth is obligated to charge cost-based rates for unbundled network elements, even if they replicate a BellSouth service when combined.⁶²⁰ As discussed above, the Commission concluded in the *Local Competition Order* that section 251(c)(3) does not require a new entrant to construct local exchange facilities before it can

⁶¹⁵ *Ameritech Michigan Order* at para. 49.

⁶¹⁶ Department of Justice Evaluation at 12-31.

⁶¹⁷ LCI Comments at 14; LCI Comments, Tab 4, Declaration of Kay D. Speerstra (LCI Speerstra Decl.) at para. 14; Sprint Reply Comments at 2-7; WorldCom Comments at 15-16.

⁶¹⁸ LCI Speerstra Decl., Ex. E at 2 (Letter of Fred Monacelli, BellSouth, to Anne K. Bingaman, LCI, Oct. 7, 1997). We note that LCI and BellSouth do not appear to have entered into an interconnection agreement for unbundled network elements in South Carolina. See BellSouth Application, App. B (collection of interconnection agreements signed by BellSouth in South Carolina).

⁶¹⁹ BellSouth Application at 39. BellSouth's SGAT states that "CLECs may combine BellSouth network elements in any manner to provide telecommunications services," but is silent with respect to the rate charged under the SGAT when a new entrant duplicates a BellSouth retail service through the combination of network elements obtained from BellSouth. See SGAT § II(F).

⁶²⁰ The only statement in the South Carolina Commission Comments on this issue is the following: "The [South Carolina] Commission also determined in the AT&T arbitration that it is appropriate for BellSouth to charge the retail rate less the 14.8% discount where a CLEC wishes to order unbundled network elements in a manner that produces an existing BellSouth retail service and the CLEC does not wish to undertake the job of combining the elements." South Carolina Commission Comments at 9.

use unbundled network elements to provide a telecommunications service.⁶²¹ The Eighth Circuit in *Iowa Utilities Board* also held that "under section 251(c)(3) a requesting carrier is entitled to gain access to all of the unbundled elements that, when combined by the requesting carrier, are sufficient to enable the requesting carrier to provide telecommunications services."⁶²² Because the use of unbundled network elements, as well as the use of combinations of unbundled network elements, is an important entry strategy into the local telecommunications market, we will examine carefully any similar allegations in future applications.

D. Resale of Contract Service Arrangements

1. Background

212. Section 271(c)(2)(B)(xiv) of the competitive checklist requires that telecommunications services be "available for resale in accordance with the requirements of sections 251(c)(4) and 252(d)(3)." Section 251(c)(4), in turn, imposes upon incumbent LECs the duty "to offer for resale at wholesale rates any telecommunications service that the carrier provides at retail to subscribers who are not telecommunications carriers; and . . . not to prohibit, and not to impose unreasonable or discriminatory conditions or limitations on, the resale of such telecommunications service. . . ." The Commission concluded in the *Local Competition Order* that resale restrictions are "presumptively unreasonable."⁶²³ The Commission also explicitly held that services offered through customer-specific contract service arrangements (CSAs) are "telecommunications services" subject to the wholesale discount resale requirement of section 251(c)(4)(A):

Section 251(c)(4) provides that incumbent LECs must offer for resale at wholesale rates "any telecommunications service" that the carrier provides at retail to noncarrier subscribers. This language makes no exception for promotional or discounted offerings, including contract and other customer-specific offerings. We therefore conclude that no basis exists for creating a general exemption from the wholesale requirement for all promotional or discount service offerings made by incumbent LECs.⁶²⁴

CSAs are contractual agreements made between a carrier and a specific, typically high-volume, customer, tailored to that customer's individual needs. CSAs may include volume

⁶²¹ *Local Competition Order*, 11 FCC Rcd at 15666. The Commission determined that such limitations on access to combinations of unbundled network elements would seriously inhibit the ability of potential competitors to enter local telecommunications markets through the use of unbundled elements, and would therefore significantly impede the development of local exchange competition. *Id.*

⁶²² *Iowa Utils. Bd.*, 120 F.3d at 815.

⁶²³ *Local Competition Order*, 11 FCC Rcd at 15966.

⁶²⁴ *Id.* at 15970; see *AT&T/LCI Motion to Dismiss* at 15 & n.12.

and term arrangements, special service arrangements, customized telecommunications service agreements, and master service agreements.

213. The Commission's rules on resale restrictions provide that, "[e]xcept as provided in § 51.613 of this part, an incumbent LEC shall not impose restrictions on the resale by a requesting carrier of telecommunications services offered by the incumbent LEC."⁶²⁵ Rule 51.613 provides in pertinent part that, "[w]ith respect to any restrictions on resale not permitted under paragraph (a), an incumbent LEC may impose a restriction only if it proves to the state commission that the restriction is reasonable and nondiscriminatory."⁶²⁶ The Eighth Circuit specifically held that determinations on resale restrictions are within the Commission's jurisdiction and upheld our resale restriction rules as a reasonable interpretation of the 1996 Act's terms.⁶²⁷

214. BellSouth states clearly that it will not make CSAs available at a wholesale discount.⁶²⁸ BellSouth's SGAT provides that "BellSouth's contract service arrangements are available for resale only at the same rates, terms and conditions offered to BellSouth end users."⁶²⁹

2. Discussion

215. We find that BellSouth fails to comply with item fourteen of the competitive checklist by refusing to offer CSAs at a wholesale discount. Moreover, based on evidence presented in the record, we are concerned that BellSouth's failure to offer CSAs for resale at

⁶²⁵ 47 C.F.R. § 51.605(b).

⁶²⁶ *Id.* § 51.613(b). The resale restrictions permitted under subparagraph (a) do not involve CSAs. Those permissible restrictions relate to cross-class selling and short term promotions. *Id.* § 51.613(a)(1), (a)(2).

⁶²⁷ *Iowa Utils. Bd.*, 120 F.3d at 818-19. The Eighth Circuit held:

[W]e believe that the FCC has jurisdiction to issue these particular rules and that its determinations are reasonable interpretations of the Act. . . . [S]ubsection 251(c)(4)(B) authorizes the Commission to issue regulations regarding the incumbent LECs' duty not to prohibit, or impose unreasonable limitations on, the resale of telecommunications services. . . . [47 C.F.R. § 51.613] is a valid exercise of the Commission's authority under subsection 251(c)(4)(B) because it restricts the ability of incumbent LECs to circumvent their resale obligations under the Act simply by offering their services to their subscribers at perpetual "promotional" rates.

Id. at 819.

⁶²⁸ See SGAT § XIV(B)(1); see also BellSouth Application at 53; see also BellSouth Varner Aff. at paras. 191-192.

⁶²⁹ SGAT § XIV(B)(1).

a discount impedes competition for its large-volume customers and thus impairs the use of resale as a vehicle for competitors to enter BellSouth's market.

216. There is no dispute that, pursuant to the terms of the SGAT, BellSouth refuses to resell CSAs at a discount. Nor is there any dispute that CSAs constitute a retail service. The issue, therefore, is whether BellSouth's refusal to offer this particular retail service at a wholesale rate constitutes a "reasonable and nondiscriminatory" restriction.⁶³⁰ In this regard, BellSouth states that the SGAT "offers CLECs wholesale rates for any services that BellSouth offers to its retail customers, with the exception of those excluded from resale requirements in accordance with the Commission's rules and the orders of the [South Carolina Commission] . . . includ[ing] . . . contract service arrangements (which are available for resale at the same rates, terms and conditions offered to BellSouth's end user customers)."⁶³¹ BellSouth provides no explanation in its Brief in Support of its refusal to offer CSAs at wholesale rates, nor any rationale for considering the refusal reasonable or nondiscriminatory. BellSouth's supporting affidavits note that the South Carolina Commission concluded in the *AT&T Arbitration Order* that "the wholesale discount would not be applied to CSAs."⁶³² In the *AT&T Arbitration Order*, the South Carolina Commission stated that CSA's "should not receive a further discount below the contract service arrangement rate."⁶³³ The state commission justified this conclusion by arguing that "CSAs are designed to respond to specific competitive challenges on a customer-by-customer basis. As BellSouth argued, the contract price for these services has already been discounted from the tariffed rate in order to meet competition."⁶³⁴

217. By offering CSAs only at their original rates, terms and conditions, BellSouth has created a general exemption from the wholesale requirement for CSAs. The *Local Competition Order*, however, made clear that the language of section 251(c)(4) "makes no exception for promotional or discounted offerings, including contract and other customer-specific offerings" and that, therefore, "no basis exists for creating a general exemption from the wholesale requirement for all promotional or discount service offerings made by

⁶³⁰ BellSouth's refusal to offer CSAs at a wholesale discount was the subject of a motion to dismiss filed by AT&T and LCI. *AT&T/LCI Motion to Dismiss* at 14. As noted above, we have treated the motion as early filed comments.

⁶³¹ BellSouth Application at 53.

⁶³² BellSouth Varner Aff. at para. 192. We note that BellSouth's failure to articulate in its Brief in Support its justification for the CSA restriction violates the procedural rules the Commission has promulgated to govern section 271 applications. The Commission has directed parties to present substantive arguments in their Brief in Support. Such arguments should not be contained solely in affidavits or supporting documentation. *Sept. 19th Public Notice*; see also *Ameritech Michigan Order* at para. 60 (arguments must be clearly stated in the brief with appropriate references to supporting affidavits).

⁶³³ *AT&T Arbitration Order* at 4.

⁶³⁴ *Id.* at 4-5.

incumbent LECs.⁶³⁵ BellSouth's justification for the general exemption is that the South Carolina Commission ruled in the *AT&T Arbitration Order* that the wholesale discount need not be applied to CSAs because they are already discounted. In the Local Competition proceeding, however, incumbent LECs raised the same argument with respect to volume discounts -- that the wholesale rate obligation should not apply to high volume rate offerings because they are already discounted.⁶³⁶ The Commission specifically considered and rejected this argument in the *Local Competition Order*, concluding that any service sold to end users is a retail service, and thus is subject to the wholesale discount requirement, even if it is already priced at a discount off the price of another retail service.⁶³⁷ Thus the only justification that BellSouth offered in its application for the SGAT's general exemption for CSAs is one which this Commission has specifically rejected.

218. The Commission's rules require a BOC to prove to the state commission that a resale restriction is reasonable for section 251 purposes.⁶³⁸ The rule does not contemplate, however, that a state commission can create a general exemption of all CSAs from the Act's requirement that retail offerings be available for resale at a discount from the retail price. Indeed, the *Local Competition Order* specifically found that the Act does not permit a general exemption from the wholesale requirement for promotional or discounted offerings, including CSAs.⁶³⁹ In adopting section 51.613(b) of the Commission's rules, the Commission explained that 51.613(b) was intended to and grants state commissions the authority only to approve "narrowly-tailored" resale restrictions that an incumbent LEC proves to a state commission are reasonable and nondiscriminatory.⁶⁴⁰ To interpret the rule to allow states to create a general exemption from the wholesale requirement for all CSAs would run contrary to the Act. Thus, BellSouth's general restriction on the provision of CSAs at wholesale rates is unlawful.

219. Following BellSouth's application, and AT&T's and LCI's motion to dismiss in part on CSA grounds, the South Carolina Commission, in their comments, and BellSouth in its reply, have provided further justifications for the CSA restriction. BellSouth and the South Carolina Commission contend, for example, that the South Carolina Commission's approval of the CSA exemption is a local pricing matter within the South Carolina Commission's

⁶³⁵ *Local Competition Order*, 11 FCC Rcd at 15970.

⁶³⁶ *Id.* at 15968.

⁶³⁷ *Id.* at 15971 ("If a service is sold to end users, it is a retail service, even if it is priced as a volume-based discount off the price of another retail service."); see also *AT&T/LCI Motion to Dismiss* at 15 & n.12.

⁶³⁸ 47 C.F.R. § 51.613(b). The Eighth Circuit held that determinations on resale restrictions are within the Commission's jurisdiction, and that our resale restriction rules are a reasonable interpretation of the terms of the 1996 Act. *Iowa Utils. Bd.*, 120 F.3d at 818-19.

⁶³⁹ *Local Competition Order*, 11 FCC Rcd at 15966, 15970.

⁶⁴⁰ *Id.* at 15966.

intrastate jurisdiction.⁶⁴¹ This contention is erroneous. The Commission's conclusions in the *Local Competition Order* regarding the scope of the resale requirement as it applies to promotions and discounts, including CSAs, was upheld by the Eighth Circuit.⁶⁴² In upholding the Commission's determination, the court stated that the Commission's rules requiring the resale of promotions and discounts concern the "overall scope of the incumbent LECs' resale obligation" rather than "the specific methodology for state commissions to use in determining the actual wholesale rates."⁶⁴³ Additionally, in establishing BellSouth's exemption from offering CSAs to resellers at wholesale rates, the South Carolina Commission analyzed the matter as a resale restriction rather than as a pricing issue.⁶⁴⁴ BellSouth's own arguments concerning the resale of CSAs similarly analyze the issue as a resale restriction.⁶⁴⁵ Allowing incumbent LECs to set the wholesale discount for services that must be resold at a discount of zero would wholly invalidate such a wholesale pricing obligation. Moreover, there is no evidence in the record that the South Carolina Commission conducted an analysis to determine that the appropriate discount for CSAs should be zero.

220. The South Carolina Commission also contends that its policy with respect to pricing for CSAs is the only reasonable way to implement the Act's resale provisions. The South Carolina Commission states that BellSouth does not bear ordinary marketing costs for CSAs because they are individually negotiated arrangements, and that therefore the 14.8 percent resale discount applicable to BellSouth's generally available retail offerings would greatly overstate the costs avoided by BellSouth. Moreover, the South Carolina Commission contends that it would be impossible to determine on a case-by-case basis what discount is necessary to account for BellSouth's potential cost savings with respect to a particular CSA.⁶⁴⁶ We do not believe, however, that such a process would be necessary. Because similar marketing, billing, and other costs would be avoided for all CSAs, we believe that it would be feasible, and sufficiently accurate, to calculate a single discount rate that would apply to all CSAs.⁶⁴⁷ A single discount rate based on the costs avoidable through offering CSAs at wholesale could be applied easily and would ensure that BellSouth was made no worse off by the resale of its services. AT&T states that neither BellSouth nor the South Carolina Commission has provided any analysis to show that the 14.8 percent discount rate would

⁶⁴¹ BellSouth Reply Comments at 60; South Carolina Commission Comments at 11.

⁶⁴² *Iowa Utils. Bd.*, 120 F.3d at 819.

⁶⁴³ *Id.*

⁶⁴⁴ See *AT&T Arbitration Order* at 4-5 ("The Act indeed permits reasonable and non-discriminatory conditions or limitations on the resale of telecommunications services, and we therefore condition our ruling with respect to CSAs.").

⁶⁴⁵ See BellSouth Reply Comments at 60.

⁶⁴⁶ South Carolina Commission Comments at 10.

⁶⁴⁷ In the *Local Competition Order*, the Commission concluded that the discount rate could vary by service. *Local Competition Order*, 11 FCC Rcd at 15957-58.

overstate the avoided costs of CSAs, and in fact no such analysis appears in the record presented to us.⁶⁴⁸

221. BellSouth also argues in reply that, if it were to be required to offer CSAs to resellers at a wholesale discount, it would lose customers and their contribution to total cost recovery. This, according to BellSouth, would affect its ability to meet the goal of "maximizing access by low-income consumers to telecommunications services."⁶⁴⁹ We find unpersuasive BellSouth's claims regarding contribution loss resulting from wholesale-priced resale-based competition. Claims of lost contributions to high-cost subsidies do not justify an exception from either the resale requirements or the requirement to offer unbundled network elements of sections 251 and 271.

222. AT&T and LCI have also raised the issue of cancellation penalties that may apply when a new entrant seeks to resell the CSA contract.⁶⁵⁰ They contend that such penalties have the effect of "insulat[ing] substantial portions of the market from resale competition."⁶⁵¹ There is insufficient evidence in the record concerning the exact nature of the cancellation or transfer penalties BellSouth is charging, or seeks to include in its CSAs during negotiations with potential customers, for us to conclude at this time that such fees create an unreasonable condition or limitation on resale of the service. We are sensitive that CSAs represent agreements that provide both the LEC and the CSA customer with various benefits. Because, depending on the nature of these fees, their imposition creates additional costs for a CSA customer that seeks service from a reseller, they may have the effect of insulating portions of the market from competition through resale. We, therefore, would want to review such fees and request that BOCs provide information justifying the level of cancellation or transfer fees in future applications.

223. We conclude by reemphasizing the important policy concerns that make restrictions on resale undesirable. BellSouth's CSA restriction may have significant competitive effects. Resale is one of the three mechanisms Congress developed for entry into the BOCs' monopoly market. BellSouth's restriction on CSAs may have the effect of impeding this entry vehicle. The Commission found in the *Local Competition Order* that:

the ability of incumbent LECs to impose resale restrictions and conditions is likely to be evidence of market power and may reflect an attempt by incumbent LECs to preserve their market position. In a competitive market, an individual seller (an incumbent LEC) would not be able to impose significant restrictions

⁶⁴⁸ AT&T Reply Comments at 21. AT&T asserts that CSAs might require a higher discount rate because certain costs, such as those associated with the special billing arrangements often required by high-volume end users, are typically quite substantial.

⁶⁴⁹ BellSouth Reply Comments at 61.

⁶⁵⁰ AT&T/LCI Motion to Dismiss at 18.

⁶⁵¹ AT&T Comments, App., Ex. G, Affidavit of Patricia A. McFarland (AT&T McFarland Aff.) at para 35.

and conditions on buyers because such buyers turn to other sellers. Recognizing that incumbent LECs possess market power, Congress prohibited unreasonable restrictions and conditions on resale.⁶⁵²

224. The Commission also concluded that the presumption against resale restrictions is necessary specifically for promotional or discounted offerings, such as CSAs, because otherwise incumbent LECs could "avoid the statutory resale obligation by shifting their customers to nonstandard offerings, thereby eviscerating the resale provisions of the 1996 Act."⁶⁵³ The evidence in the record suggests that these concerns are realized in South Carolina. AT&T and LCI claim that BellSouth has already filed more than twice as many CSAs in 1997 (141) as it did in 1996 (66), thus insulating a substantial portion of its market from resale competition.⁶⁵⁴ AT&T further claims that BellSouth's revenues from existing CSA contracts will amount to over \$300 million over the next three to five years.⁶⁵⁵ BellSouth thus appears to be attempting to avoid its statutory resale obligation by shifting its customers to CSAs. By foreclosing resale of CSAs, BellSouth can prevent resellers from competing for large-volume customers, thus hindering local exchange competition in South Carolina.

E. Nondiscriminatory Access to 911 and E911 Services

225. Section 271(c)(2)(B)(vii)(I) of the competitive checklist requires BellSouth to offer "nondiscriminatory access to . . . 911 and E911 services."⁶⁵⁶ The Commission concluded in the *Ameritech Michigan Order* that "section 271 requires a BOC to provide competitors access to its 911 and E911 services in the same manner that a BOC obtains such access, *i.e.*, at parity."⁶⁵⁷ In particular, the Commission found that a BOC "must maintain the 911 database entries for competing LECs with the same accuracy and reliability that it maintains

⁶⁵² *Local Competition Order*, 11 FCC Rcd at 15966.

⁶⁵³ *Id.* at 15970.

⁶⁵⁴ *AT&T/LCI Motion to Dismiss* at 18. An affidavit filed with the motion to dismiss contends that, "[i]n 1996, BellSouth filed 66 CSAs with the SCPSC. For 1997, through September 26, 1997, the number of BellSouth-filed CSAs increased to at least 141, with 32 being filed in March 1997 alone." *AT&T/LCI Motion to Dismiss*, Tab C, Affidavit of Louise B. Hayne on Behalf of AT&T Corp. at para. 3. BellSouth, on the other hand, states in an affidavit that "[i]n 1997 BellSouth has reported twenty CSAs to the South Carolina PSC and has negotiated three additional CSAs that will be included in BellSouth's next report." BellSouth Varner Reply Aff. at para. 41.

⁶⁵⁵ AT&T Comments at 43.

⁶⁵⁶ 47 U.S.C. § 272(c)(2)(B)(vii)(I). Enhanced 911 or "E911" service enables emergency service personnel to identify the approximate location of the party calling 911.

⁶⁵⁷ *Ameritech Michigan Order* at para. 256.